In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-182

T. L. BISHOP, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is another in the series of tax cases involving the question whether the captains and crews of fishing ships operating under the lay system are the shipowners' employees for purposes of the Federal Insurance Contributions Act (Section 3101 *et seq.* of the Internal Revenue Code of 1954) and the Federal Unemployment Tax Act (Section 3301 *et seq.* of the Internal Revenue Code). *Enochs* v. *Williams Packing Co.*, 370 U.S. 1; *United States* v. *Webb, Inc.*, 397 U.S. 179, reversing 402 F. 2d 956 (C.A. 5), on remand, 424 F. 2d 1070 (C.A. 5), certiorari denied, 400 U.S. 902; *Anderson* v. *United States*, 450 F. 2d 567 (C.A. 5), certiorari denied, 406 U.S. 906.

In *Webb*, this Court determined that such employment tax questions were to be decided under the "'usual' rules of maritime jurisprudence" (397 U.S. at 191). Re-

versing the district courts' contrary determinations,[1] the court of appeals here held[2] that under the maritime law, petitioners (shipowners) had not so completely relinquished control over their boats as to make them non-employers for purposes of the tax Acts. They were therefore responsible for the payment of a portion of the social security and unemployment taxes on the earnings of the captains and crews.

Petitioners do not cite any conflict of decisions as a reason for granting the writ. Rather, they seek review on the following grounds: (1) that the court of appeals erred in refusing to defer to the trial courts on the question whether the evidence here showed the requisite surrender of control of the vessels by their owners to their master (Pet. 10-13); (2) that the court of appeals erroneously utilized maritime law principles developed in Jones Act cases in resolving the issue here presented (Pet. 14-17); and (3) that the decision below violates the uniformity requirements of Article I, Section 8 of the Constitution (Pet. 17-18). None of these arguments has any merit.

1. The control petitioners had over their vessels demonstrates the correctness of the court of appeals' conclusion that they were employers under the applicable standards of maritime law. In *Webb*, this Court stated (397 U.S. at 192) that "except where there is nearly total relinquishment of control through a bareboat, or demise, charter, the owner may nevertheless be considered,

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[1] *Bishop* v. *United States*, 334 F. Supp. 415 (S.D. Tex.) (Pet. App. 11a-32a); *Carleen F. Inc.* v. *United States* (Pet. App. 36a-63a) is not officially reported.

[2] *Bishop* v. *United States*, 476 F. 2d 977 (Pet. App. 1a-8a); *Carleen F. Inc.* v. *United States*, 476 F. 2d 981 (Pet. App. 33a).

under maritime law, to have sufficient control to be charged with the duties of an employer." None of petitioners' arrangements, however, constituted such a demise charter.

The captains selected by petitioners were not granted their captaincies for a fixed period; instead, the petitioners retained the power to terminate their arrangements at any time (Pet. App. 6a-7a, 24a, 33a, 41a)—a right which the Fifth Circuit correctly characterized as "a powerful force" (Pet. App. 7a). Moreover, the agreements themselves sharply limited the captains' freedom and provided for a degree of shipowner involvement not consistent with a true demise charter. The captains were expected to return to designated fish wholesalers for unloading whenever possible (Pet. App. 25a, 42a) and the captains had to obtain petitioners' permission to unload elsewhere when it was impractical to return to home port (Bishop R. 29, 31, 34; Carleen F, R. 12).[3] Thus, the captain and his crew lacked any real economic independence in the employment of the vessel. Petitioners did not permit intoxicating beverages on the boats (Pet. App. 42a; Bishop R. 30); they supplied the fishing equipment, shared the costs of maintenance, paid for fuel, ice and other expenses of the trip and maintained insurance on the boats (Pet. App. 25a, 27a-28a, 43a-44a). Petitioners had not entered into a demise charter, since they had not "completely and exclusively relinquish[ed] 'possession'" of their boats to their captains (*Guzman* v. *Pichirilo,* 369 U.S. 698, 699, quoting *United States* v. *Shea,* 152 U.S. 178). See also the authorities cited in *Anderson* v. *United States, supra,* 450 F. 2d at 572, n. 13.

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[3] "Bishop R." and "Carleen F, R." references are to the separately bound record appendices filed by the respective parties.

2. Without suggesting an alternative maritime legal standard, petitioners contend (Pet. 14-17) that the maritime law applicable to employment tax cases should not be the decisional law developed under the Jones Act. In short, petitioners would have one body of maritime law applicable to the Jones Act and another to the employment tax Acts. This Court, however, has already rejected the concept of a special law for maritime employment tax cases, for in *Webb, supra,* it stated (397 U.S. at 190) that:

> We do not think Congress intended the anomalous result of having maritime activities subject to standards, for social security tax purposes, other than those that are relevant to seafaring enterprises.

And following this Court's admonition that maritime legal standards be applied in these employment tax cases, the Fifth Circuit correctly reaffirmed its prior conclusion that the Jones Act cases were a proper source of maritime law for these purposes. See *United States* v. *Webb, Inc.*, 424 F. 2d 1070, and *Anderson* v. *United States, supra,* 450 F. 2d at 570, n. 8.

3. Finally, petitioners argue (Pet. 17-18) that the use of the Jones Act decisional law in the employment tax context will produce a nonuniform pattern of taxation in violation of Article I, Section 8 of the Constitution. They cite no instance, however, in which the use of a single federal legal principle employed in resolving disputes under a nationally applicable statute has given rise to anything other than uniform federal tax treatment.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

DOJ-1973-09